

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ERIC BOEL
Claimant

APPEAL NO: 15A-UI-10405-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CERNER CORPORATION
Employer

OC: 08/02/15
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 8, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 30, 2015. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Cortney Xiong, Program Manager and Ali Shabbir, Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time solution consultant for Cerner Corporation from February 27, 2014 to September 26, 2014. He was discharged for harassing a female associate and for questionable expense reports and expenditures.

On August 26, 2014, the employer was holding a team meeting with approximately 50 employees present. It was making a presentation regarding what was not appropriate business attire to wear around clients and included a picture of a female employee in a short skirt and low cut blouse. When that picture appeared the claimant stood up and began clapping, causing other employees to be uncomfortable. Manager Ali Shabbir talked to the claimant about his behavior and told him it was unprofessional and inappropriate.

On September 12, 2014, the claimant and two female associates were in Kansas City performing work for the employer. The three employees had plans to go to dinner but one of the female employees eventually stated she was going to the gym instead of dinner. The claimant indicated he still wanted to go to dinner and the other female associate agreed to go with him. While at dinner the claimant said to the female associate, who was a recent college graduate and new to the workforce and work place, "Did you see (another woman's) dress? It

was cut much shorter than yours and your legs are much better.” After dinner the claimant asked the female associate if she wanted to go to the hotel bar to practice their presentation and she declined and went to her room. The claimant then proceeded to text her several times asking her to come to the bar. He ended the conversation by saying, “What? No hug and kiss good night?” The female associate complained to her manager the next day and that manager contacted Mr. Shabbir who notified associate relations of the problem. After the employer investigated the situation, it informed the claimant September 26, 2014, that his employment was terminated for harassing a female co-worker.

The employer had also developed trust issues with the claimant because of the manner in which he was handling his expense reports. The claimant was adding personal items to his expense reports and claiming that he was performing work when he was not actually doing so. The employer emailed him about one such report August 21, 2014, when the claimant charged one year of in-flight wi-fi to his company credit card. The claimant did not respond to the employer's email about that situation until September 4, 2014, and at that time did not provide a satisfactory explanation. On September 5, 2014, the credit card company cancelled the claimant's employer provided Diner's Club card for being 90 days past due. The claimant was responsible for submitting his expense reports in a timely manner so the employer could pay the credit card bill or paying the bill on time himself and submitting the necessary paperwork to be reimbursed. On September 7, 2014, the claimant provided the employer with another expense report where he had purchased the fuel option and a larger vehicle on a rental car which was a violation of the employer's policy.

The claimant has claimed and received unemployment insurance benefits in the amount of \$3,174.00 for the seven weeks ending September 19, 2015.

The employer participated in the fact-finding interview through the written statements of Unemployment Insurance Advisor Jeff Oswald.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant acted inappropriately and unprofessionally during the team meeting August 26, 2014, by standing and applauding the short skirt and low cut blouse used as an example of what not to wear to client meetings and was admonished by the employer at that time. Less than three weeks later, however, he again displayed inappropriate and harassing behavior toward a female co-worker by making improper advances toward a young female colleague, both by his comments comparing the appearance of another woman and the young female associate and asking her to go to the hotel bar with him and then repeatedly texting her after she stated she did not wish to go and went to her room. He concluded that conversation by stating, "What? No hug and kiss good night?" All associates have the right to perform their jobs without being harassed by an older male associate and the claimant knew or should have known that his behavior would not be welcome in a workplace setting. The employer's anti-harassment policy is contained in its online handbook. The claimant violated that policy twice within a three-week period. Those incidents alone constitute disqualifying job misconduct.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Jeff Oswald. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$3,174.00.

DECISION:

The September 8, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$3,174.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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